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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ARMANDO NUNEZ, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LINDA T. COBERLY
Counsel of Record
BROOK R. LONG
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Seventh Circuit erred in holding—in conflict with seven of its sister circuits—that a criminal defendant who enters a plea agreement containing a waiver of the right to appeal also forfeits the protections recognized by this Court in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which held that if the defendant requests an appeal and counsel fails to file a timely notice of appeal, the defendant is entitled to habeas relief in the form of a new direct appeal without first being required to show that the forfeited appeal would have had merit.

PARTIES TO THE PROCEEDINGS

Petitioner Armando Nunez was the petitioner-appellant under 28 U.S.C. § 2255 in the courts below. The United States was the respondent-appellee below. There are no other parties.

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INTRODUCTION

This case provides the Court with an opportunity to resolve an important conflict among the circuits with respect to a criminal defendant's appeal rights. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), this Court held that when a defendant asks for an appeal, his counsel's failure to file a timely notice of appeal constitutes ineffective assistance of counsel, is presumptively prejudicial, and entitles the defendant to a new direct appeal—without any requirement that he first show his appeal would have been meritorious. As discussed below, seven circuits have held that *Flores-Ortega* applies even where the defendant's guilty plea entailed a waiver of the right to appeal.

The Seventh Circuit has now departed from that rule, holding that even on the assumption that counsel failed to file an appeal following an express request by the defendant, the defendant is not entitled to a new, out-of-time appeal if the plea agreement contained a valid waiver of the right to appeal. Although the Seventh Circuit attempted to mitigate the conflict by holding alternatively that the relief was barred by the plea agreement's waiver of collateral review as well as direct appeal, that issue is a distraction. Collateral review waivers were also present in the cases in at least four of the seven courts of appeals who have reached the opposite result.

The Seventh Circuit's harsh and unprecedented decision conflicts with principles articulated by this Court and applied under similar circumstances by all of the other circuits to consider the issue. This Court has long recognized that the decision whether to initiate a direct appeal belongs to the defendant, not to his counsel. Petitioner urges this Court to grant review in this case to resolve this stark dispute about

whether and how that basic principle applies in the context of appeal waivers.

OPINIONS BELOW

The Seventh Circuit's opinion affirming the decision of the district court is reprinted in the appendix to this petition ("App.") at 1a-9a, and is reported at 495 F.3d 544 (7th Cir. 2007). The opinion of the district court (App. 10a-17a) is available on the Westlaw electronic database as 2005 WL 2675043 (N.D. Ill. Oct. 15, 2005). The Seventh Circuit's order denying rehearing *en banc* (App. 18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2007, and the order of the court of appeals denying Petitioner's timely petition for rehearing *en banc* was entered on September 19, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This Petition involves the Sixth Amendment of the United States Constitution, the relevant portion of which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

STATEMENT

Armando Nunez is an individual of Mexican heritage who speaks little English. He pleaded guilty to various drug possession and distribution offenses. The plea agreement he signed waived his right to appeal or collaterally attack his sentence, except on the basis that the waiver was involuntary or tainted by ineffective assistance of counsel.

After sentencing, Nunez asked his lawyer to appeal, but his lawyer did not do so. Nunez later filed a habeas petition in which he alleged, inter alia, that he had told his attorney he wished to file an appeal and argue that he had not understood his plea agreement. Nunez's habeas petition was denied without an evidentiary hearing, and the Seventh Circuit affirmed on the basis that the record showed that Nunez's waiver of the right to appeal and to collateral review was valid and should be enforced.

The Plea Agreement. Nunez was indicted on two counts of conspiring to possess with intent to distribute and conspiring to distribute in excess of five kilograms of mixtures including cocaine in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2, and one count of distributing more than half a kilogram of mixtures including cocaine in violation of 21 U.S.C. § 841(a)(1). He initially pleaded not guilty, and defense attorney John M. Cutrone appeared on his behalf

Subsequent plea negotiations between Cutrone and the government resulted in an offe that Cutrone thought suitable. Cutrone Aff. at 3. Nunez would plead guilty to one of the conspiracy counts, and the government would voluntarily dismiss the remainder and recommend a sentence at the low end of the applicable range. *Id.* at 2-3. The plea would also likely entitle him to beneficial treatment under the Sentencing Guidelines.

Cutrone recommended that Nunez accept the offer. According to an affidavit by Cutrone filed during the habeas proceedings, Nunez had established a proficiency in English and indicated that he understood and agreed with Cutrone's conclusion that the government's case was strong and that it would be best

to accept the government's offer. *Id.* at 3, 5. Nunez, however, later contended that he had no interpreter during plea negotiations and that "there was nothing in the plea . . . that [Nunez] actually understood while signing the documents." Supp. to Nunez § 2255 Pet. at 2.

The plea agreement included a waiver provision stating that by pleading guilty, Nunez (1) "waiv[es] all appellate issues that might have been available if he exercised his right to trial"; (2) "waives the right to appeal any sentence within the maximum provided [by] statute . . . , or the manner in which that sentence was determined"; and (3) "waives the right to challenge his sentence or the manner in which it was determined in any collateral attack." Nunez Plea Agreement at 11. The waiver states that it "does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or its negotiation." *Ibid.*

The Guilty Plea. At his change-of-plea hearing, aided by an interpreter, the district court received Nunez's guilty plea and questioned him to confirm that the plea was knowing and voluntary and that Nunez was in fact guilty. When asked whether his plea agreement had been read to him in Spanish, Nunez answered "no," an answer that Cutrone qualified by stating that Nunez and he had reviewed the plea agreement in English and that Cutrone had asked him repeatedly if he understood. The court then asked Nunez a series of questions in English, to many of which Nunez answered a simple "Yes." Those included:

- whether Nunez had had the services of an interpreter to help him communicate with Cutrone;

- whether Cutrone had explained the charges and their consequences to Nunez's satisfaction;
- whether Nunez was "convinced" that he understood the provisions of the plea agreement and was satisfied with it having been read for him in English rather than Spanish;
- whether Nunez was in fact guilty of the charges;
- whether Nunez was pleading guilty voluntarily;
- whether Nunez understood he was waiving his right to appeal or collateral review on any ground other than involuntariness or ineffective assistance of counsel in the negotiation of the waiver.

Gov't Appellee Br. at 7-9. When asked whether he was satisfied with Cutrone's representation, Nunez answered "So far, yes." *Id.* at 7. The court then accepted the plea.

The Sentencing. Nunez was sentenced on June 10, 2003. By that time Cutrone had withdrawn, and Nunez was represented by attorney Robert L. Rascia. Counsel's sole motion at this hearing was for an extraordinary circumstances downward departure. This motion was denied.

The court sentenced Nunez to 135 months followed by a period of supervised release. This sentence was above the statutory minimum but at the bottom end of the applicable guidelines range. On the record, the government suggested that the court inform Nunez that he had ten days to file an appeal to the extent he had not waived his rights of appeal. The court declined to do so specifically, explaining that "[i]t is my understanding that there was a full wa[iv]er of direct appeal" and "I think it confuses the

issue if you tell him he possibly has the right." Sentencing Hrg. Tr. at 11-12.

According to Nunez, he then asked his counsel to file an appeal, but no timely notice of appeal was ever filed on his behalf.

The Habeas Petition. On May 13, 2004, Nunez filed a *pro se* petition pursuant to 28 U.S.C. § 2255. Among other things, the petition alleged that "Counsel failed to file Notice of Appeal." § 2255 Pet. at 5-6. In a supplemental filing, Nunez elaborated by alleging that he "felt he entered into the waiver involuntarily and wished to appeal" based on ineffective assistance of counsel. According to Nunez, his counsel had promised to file the notice of appeal but failed to do so. Supp. to § 2255 Pet. at 2. Citing *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), Nunez argued that this was *per se* ineffective assistance of counsel entitling him to relief. He also complained of the lack of an interpreter during plea negotiations. In an affidavit filed with the court, Cutrone denied that Nunez had expressed any interest in an appeal.

The District Court Decision. The district court denied Nunez's petition. The court rejected most of the arguments in the *pro se* petition as either meritless, subject to the waiver of collateral review contained in the plea agreement, or "confusing . . . [and] not cognizable." App. 12a-13a. The court went on to acknowledge Nunez's argument that he told counsel to file a notice of appeal and that counsel failed to file one. *Id.* at 13a. The court also noted Nunez's contention that he had wished to raise the involuntariness of his plea on direct appeal. *Ibid.* But instead of resolving the factual dispute about whether Nunez asked for an appeal, the district court concluded that counsel's

"failure to file an appeal" was moot because the district court itself would "incorporate his voluntariness arguments into the pending § 2255 petition," *id.*, deciding the issue based on Nunez's *pro se* submissions and under the standards governing requests for habeas relief. The district court's decision did not cite *Flores-Ortega*.

The district court concluded that Nunez's plea and waiver were voluntary. It rejected his argument that he had understood "nothing" in his plea agreement based on his testimony at the change of plea hearing where an interpreter was present; his failure to raise any objection at sentencing; Cutrone's affidavit attesting that Nunez could communicate in English; and the fact that Nunez's filing consisted of "complex words and ideas in cogent English." *Id.* at 13a-15a. The court did not discuss or consider the possibility that Nunez's habeas papers had been prepared with the assistance of other inmates in the prison where he was incarcerated.

The Seventh Circuit's Decision. Nunez appealed and was granted a certificate of appealability. His papers on appeal (again, submitted *pro se*) emphasized the impact of counsel's failure to file a notice of appeal, thus denying him the opportunity to present his involuntariness argument in an appeal as of right. Nunez also argued that to the extent there was a factual dispute as to whether he requested a notice of appeal, the Seventh Circuit should remand for an evidentiary hearing on the issue.

The Seventh Circuit affirmed. See App. 1a-8a. In an opinion authored by Chief Judge Easterbrook, the court held that even if Nunez had, in fact, expressly requested an appeal, his counsel's failure to file one did not entitle him to a new, out-of-time appeal.

The court first acknowledged one key difference between direct and collateral review—noting that because of Nunez's failure to attempt to withdraw his plea in the district court, any issues raised on the direct appeal would have been subject to plain error review. On collateral review, counsel's failure to take a direct appeal meant, in practical effect, that Nunez would be required to show cause and prejudice for his claim of involuntariness. Standards of review aside, however, the court announced that Nunez would lose "on *any* standard."

Assuming for the purposes of decision that Nunez did ask counsel to file a notice of appeal, the court held that because Nunez had testified under oath before the trial court that his plea was voluntary and that he understood the plea agreement's provisions, the appeal waiver was effective. *Id.* at 2a-3a. The court acknowledged that "[i]f the plea was involuntary, then the waiver falls because it is part of the whole package." *Id.* at 2a. But because it believed the plea was voluntary, the court held that "the waiver must be enforced. And the waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal." *Id.* at 3a.

The court acknowledged that several federal circuits had held "that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on his client's request." *Ibid.* The court also noted that "[a] defendant who wants a lawyer to argue on appeal that the plea was involuntary has a right to that legal assistance," and that a waiver does not bar appeal on grounds beyond the waiver's scope. *Id.* at 4a. Furthermore, in the Seventh Circuit's opinion, a bright-line requirement that counsel file a notice of appeal whenever the client requested one would perhaps be a useful addition to the Rules of Criminal Procedure,

but the court doubted that it was a constitutional requirement. It was "[u]sually . . . true," the court explained, that as *Flores-Ortega* concluded, counsel's failure to file a requested notice of appeal "cannot be considered a strategic decision [because] filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Id.* at 5a. But "filing cannot be called 'ministerial' when the defendant has waived any entitlement to appeal, not only in the plea agreement but also in open court." *Ibid.* In part this was because "a lawyer has a duty to the judiciary to avoid frivolous litigation." *Ibid.* But it was also because an appeal with no chance of success could jeopardize benefits under a plea bargain. *Id.* at 5a-6a. Therefore, according to the court, "counsel's duty to protect his client's interests militates against filing an appeal" in such a situation: "Protecting a client from a layperson's folly is an important part of a lawyer's job." *Id.* at 6a-7a.

The Seventh Circuit conceded that "[o]rdinarily a lawyer cannot make an independent decision about whether an appeal would be frivolous" and instead must file an *Anders* brief to obtain a court's agreement that counsel may withdraw because the appeal is frivolous. *Id.* at 6a. But "the *Anders* procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach." *Ibid.*

After disagreeing with the rule followed by other circuits, the Seventh Circuit attempted to articulate an alternative holding that would not entail taking a position on the other circuits' conclusions. *Id.* at 7a. The court pointed to Nunez's waiver of the right to collateral review, which was part of the plea that the

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court had already determined to be voluntary; the court noted that any claim to ineffective assistance other than one challenging the negotiations of the waiver itself was within the scope of that waiver. Because any post-plea ineffective assistance (such as the failure to file a notice of appeal) could not retroactively taint the plea negotiations, Nunez's ineffective assistance argument was no challenge to the validity of the waiver and was barred by it. *Id.* at 7a-8a.

Therefore "whether or not his lawyer should have filed an appeal on demand," the court held that Nunez's waiver barred collateral review on that basis. *Id.* at 8a. The court failed to acknowledge, however, that in four decisions in which the court of appeals had reached the opposite result, collateral review waivers were also present. See *infra* at 21.

REASONS FOR GRANTING THE PETITION

The right to appeal and the right to have the assistance of counsel on appeal are of little use to a criminal defendant whose appeal has been forfeited through attorney error. In *Roe* v. *Flores-Ortega*, this court reaffirmed the "long held [principle] that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." 528 U.S. 470, 477 (2000). It also confirmed that a criminal defendant whose appeal has been forfeited through such attorney error is entitled to receive a new direct appeal without first needing to show that the appeal would have merit. *Id.* at 484. Thus *Flores-Ortega* places the decision whether to file an appeal squarely in the hands of the defendant himself and protects that right by ensuring relief if counsel fails to honor his client's wishes.

The circuits are now divided about whether *Flores-Ortega* applies in cases where the defendant entered a guilty plea that included a waiver of further review. This Court's intervention is needed to resolve this issue and to prevent any further erosion of a defendant's right to decide whether to lodge an appeal.

I. This Court has held that counsel's failure to honor a client's wish to take an appeal is *per se* ineffective assistance and entitles the petitioner to relief in the form of a new direct appeal.

An understanding of the current conflict in the law first requires a review of this Court's cases on the rights to appeal and to the assistance of counsel. As this discussion shows, even if the Seventh Circuit's decision had been the first to address the question presented in this case, its outcome would be at odds with this Court's cases. That itself would be sufficient to call for certiorari review.

A. This Court's cases vest the defendant himself with the right to decide whether to appeal.

A criminal defendant's right to appeal from a federal conviction and sentence is statutory in nature. See 18 U.S.C. § 3742; 28 U.S.C. § 1291; *McKane* v. *Durston*, 153 U.S. 684, 687 (1894) (Constitution does not guarantee a right to direct appeal). The defendant does have a constitutional right to counsel on any direct appeal, see *Douglas* v. *California*, 372 U.S. 353 (1963), and to effective assistance from such counsel, see *Evitts* v. *Lucey*, 469 U.S. 387 (1985). That right does not arise in post-conviction collateral review. *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987).

The standard for ineffective assistance of counsel claims is clear. In *Strickland* v. *Washington*, 466 U.S. 668, 688-94 (1984), this Court held that a criminal defendant's right to counsel under the Sixth

Amendment is violated when counsel's performance falls "below an objective standard of reasonableness" and such deficient performance prejudices the defendant. Prejudice is presumed if, among other things, there is a "complete denial of counsel. . . . at a critical stage." *United States* v. *Cronic*, 466 U.S. 648, 659 (1984). The complete denial of the right to counsel on appeal falls into this category and entitles a defendant to a new appeal without any showing of prejudice. See *Penson* v. *Ohio*, 488 U.S. 75, 88 (1988).

The right to counsel on appeal is qualified by the principle that a defendant does not have the right to pursue an appeal that is frivolous. *Penson*, 488 U.S. at 83 (frivolousness necessarily triggers "a limited exception to the requirement articulated in *Douglas*"). This Court's framework for balancing the defendant's rights with counsel's obligation not to pursue a frivolous appeal is set forth in *Anders v. California*, 386 U.S. 738 (1967). Under *Anders*, counsel must conduct "a conscientious examination" of the case and, if convinced the appeal is frivolous, should request leave to withdraw from the case in a brief that "refer[s] to anything in the record that might arguably support the appeal." *Id.* at 744. At that point, the defendant is afforded an opportunity to respond, and the court of appeals must conduct its own "full examination of all the proceedings, to decide whether the case is wholly frivolous." *Ibid.* Thus the proper course for a defense lawyer who is asked to file an appeal—but who questions whether there is any nonfrivolous ground for doing so—is to file the notice of appeal first and then consider the arguments and file an *Anders* brief if appropriate.

This precedent reflects the fact that there are some decisions so important and personal that they are reserved to the client alone. Even though *which* issue

to brief on appeal is a strategic decision not reserved to the client, the decision *whether* to appeal is a "fundamental decision[]" which "the accused has the ultimate authority to make." *Jones* v. *Barnes,* 463 U.S. 745, 751 (1983).

The right to decide whether to appeal—even over contrary advice from counsel—is analogous, and arguably equally as "personal," as the right to proceed *pro se.* See *Faretta* v. *California*, 422 U.S. 806, 834 (1975) ("It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored . . . ."). This right should not be denied to the criminal defendant merely because counsel believes an appeal would fail—or even because counsel believes that pursuing an appeal may be more harmful than helpful to his client. See App. 7a (characterizing Nunez's appeal as "[t]he sort of appeal . . . where the defendant can . . . . [only] lose but not gain"). Thus, while a defense lawyer may have an ethical obligation to advise his client about the potential risks of proceeding with an appeal—including, for example, the risk of losing some of the benefit of a negotiated plea agreement—the lawyer may not simply make the decision for him.

B. A defendant for whom a requested appeal was never filed is entitled to relief under Section 2255 in the form of a new direct appeal.

In *Roe* v. *Flores-Ortega*, this Court reaffirmed these basic principles and held that a habeas petitioner is entitled to a new appeal if he can show that defense counsel improperly failed to file a notice of appeal and that his failure led to the forfeiture of an appeal that the defendant would otherwise have pursued. 528 U.S. 470, 477-81, 481-86 (2000). The defendant's

right to habeas relief does not turn on whether he has already demonstrated to the court on collateral review that his appeal would have been meritorious. *Id.* at 486.

The defendant in *Flores-Ortega* pleaded guilty to murder. Afterward, counsel declined to consult with his client about the possibility of appeal and failed to file a timely notice of appeal. *Id.* at 473-75. The case reached this Court in the context of the petitioner's unsuccessful bid for collateral relief.

The Court reasoned that "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds to appeal), *or* (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480 (emphasis added). The starting point of this analysis was the "long held [principle] that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Id.* at 477; see also *Peguero* v. *United States*, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit" (citing *Rodriquez* v. *United States*, 395 U.S. 327, 329-30 (1969))). Again, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . *take an appeal*." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (emphasis added). "[A] defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice [and] [c]ounsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a

purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Flores-Ortega*, 528 U.S. at 477.

Thus, before the Court in *Flores-Ortega* even grappled with how to determine when a lawyer has a duty to consult with the client about whether to appeal, the Court recognized that if counsel *does* consult and the client *does* request an appeal, "the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* at 478.

The discussion of the issue of prejudice in *Flores-Ortega* is also instructive. According to the Court, prejudice in this context does not turn on whether the defendant would have *prevailed* on appeal. Instead, it turns on whether the defendant would have *pursued an appeal* if his counsel had only conferred with him about it. *Id.* at 484. If counsel's deficient performance cost the defendant his ability to have a direct appeal, prejudice is presumed. *Id.* at 484-86.

The defendant's inability to demonstrate the merit of the forfeited appeal does not foreclose the possibility that he would have insisted (or did, in fact, insist) on an appeal even after discussing the issues with counsel. *Id.* at 486; see also *Rodriquez*, 395 U.S. at 330 (defendant whose counsel failed to file a requested notice of appeal should not be denied a new appeal based on his "failure to specify the points he would raise were his right to appeal reinstated" because such a defendant has been "deprived of the[] only chance to take an appeal even though [he] ha[s] never had the assistance of counsel in preparing one"); cf. *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000) (prejudice is presumed where defendant was altogether denied the right to counsel on appeal). Indeed,

it would be unfair to force an indigent, *pro se* defendant to identify meritorious grounds for appeal when no "advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Flores-Ortega*, 528 U.S. at 486.[1]

To be sure, *Flores-Ortega* does not make the merits of the appeal altogether irrelevant—in that a lawyer's failure to consult with his client about the possibility of appeal may not fall below the level of unreasonableness if it was apparent that any appeal would have been frivolous. But *Flores-Ortega* also made clear that counsel *must* consult with his client—regardless of the merits of an appeal—when "this particular defendant reasonably demonstrated" an interest in appeal. 528 U.S. at 480. And the duty to consult must encompass a duty to respect the client's wishes; it would make little sense if the Constitution required a lawyer to consult with his client but permitted him to ignore the client's decision.

C. The Seventh Circuit's decision is contrary to the reasoning of this Court's decision in *Flores-Ortega*.

Under *Flores-Ortega*, then, the only question is whether the defendant would have chosen to appeal. The merits of the appeal are not important if the defendant expressly stated that he wanted to file an appeal and asked counsel to do so. But the merits of the appeal are what dominated the Seventh Circuit's

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[1] See also *Douglas*, 372 U.S. at 356 ("Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required."); *Penson*, 488 U.S. at 87 ("Mere speculation that counsel would not have made a difference is no substitute for actual appellate advocacy, particularly when the court's speculation is itself unguided by the adversary process.").

analysis in this case, despite the court's assumption that Nunez had, in fact, demanded an appeal. According to the Seventh Circuit, Nunez's appeal was barred by his appeal waiver, and "an appeal in the teeth of a valid waiver is frivolous." App. 5a. The Seventh Circuit's treatment of the merits of the forfeited appeal is thus inconsistent with *Flores-Ortega*.

Further, *Flores-Ortega* contemplates that even where the defendant pleaded guilty and waived certain appeal rights, the lawyer still may be required to consult with his client about the possibility of appeal:

> Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.

528 U.S. at 480. This analysis would be pointless if, as the Seventh Circuit suggests, an appeal waiver necessarily abrogates any duty to file a notice of appeal.

Moreover, the Seventh Circuit's consideration of the merits of Nunez's appeal was itself fundamentally flawed and reflects the real and practical implications of the *Flores-Ortega* decision. In a direct appeal, Nunez would have been entitled to counsel to investigate potential claims and arguments and present them to the court. Here, by contrast, the Seventh Circuit considered the merits of the appeal and the "voluntariness" issue based only on the papers of a *pro se* litigant, given that Nunez had no right to counsel in

bringing his habeas petition. A defendant's right to a counseled direct appeal should not turn on whether he can identify meritorious challenges to his appeal waiver *without* the assistance of counsel. *Cf. Halbert* v. *Michigan*, 545 U.S. 605, 621 (2005) ("Appeals by defendants convicted on their pleas may involve myriad and often complicated substantive issues, and may be no less complex than other appeals." (citations and internal quotation marks omitted)). To the contrary, a defendant who has decided to challenge a plea agreement needs the advice of counsel no less than a defendant who took his case to trial.

In addition, as the Seventh Circuit acknowledged, the petitioner's burden in a habeas proceeding is quite different from the burden he would need to carry on the same issue in a direct appeal. Here, for example, because Nunez did not move to withdraw his plea in the trial court, "[o]n direct appeal the standard would have been plain error, but on collateral attack the forfeiture is complete and the petitioner must meet the higher standard of cause and prejudice." App. 2a (citations omitted). For that very reason, other circuits have explained that examining a potential direct appeal issue through the lens of Section 2255 is inappropriate and cannot be a substitute for the direct appeal itself. *Watson* v. *United States*, 493 F.3d 960, 964 (8th Cir. 2007) ("The 'limited perspective of collateral review' is not the appropriate vantage point from which to assess whether Watson might have any meritorious issues that can be raised on appeal in spite of his waiver.") (quoting *United States* v. *Garrett*, 402 F.3d 1262, 1267 (10th Cir. 2005); *Campusano* v. *United States*, 442 F.3d 770, 777 (2d Cir. 2006) ("We decline to adopt a rule that would allow courts to review hypothetical appeals as a substitute for real appeals that have been

blocked by attorney error."). In the instant case, of course, the Seventh Circuit went on to surmise that the standard would not matter and that Nunez's substantive argument about the involuntariness of his plea would fail on its merits either way. App. 2a. But once again, the merits of these claims should not have been considered at all, particularly when Nunez had not had the benefit of counsel to develop the arguments, as he would have had on direct appeal.

In short, the reasoning of the decision below is irreconcilable with the reasoning of *Flores-Ortega*. That alone would be a sufficient basis for a grant of certiorari, even apart from the clear and well-articulated split among the circuits on this issue.

II. The circuits are now split on whether *Flores-Ortega* applies in cases involving appeal waivers.

The Seventh Circuit's decision creates a stark conflict among the circuits on the application of *Flores-Ortega* in the context of appeal waivers. All the other circuits that have considered this question have reached the same conclusion: even a habeas petitioner whose guilty plea included an appeal waiver is entitled to a new appeal if counsel failed to file a timely notice of appeal that the petitioner explicitly requested. See *Watson* v. *United States*, 493 F.3d 960 (8th Cir. 2007); *United States* v. *Poindexter*, 492 F.3d 263 (4th Cir. 2007); *United States* v. *Tapp*, 491 F.3d 263 (5th Cir. 2007); *Campusano* v. *United States*, 442 F.3d 770 (2d Cir. 2006); *Gomez-Diaz* v. *United States*, 433 F.3d 788 (11th Cir. 2005); *United States* v. *Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005); *United States* v. *Garrett*, 402 F.3d 1262 (10th Cir. 2005).[2] These decisions are deeply in tension

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[2] In none of these cases had there been an evidentiary hearing in the district court. Thus in each case, rather than granting a

and, in many instances, squarely conflict with the Seventh Circuit's, which expressly criticized the majority rule at length and ultimately required a showing in the habeas court that the waiver was involuntary or that there were non-waived grounds for relief.

The genuineness of this conflict is illustrated by the fact that in one case decided before the Seventh Circuit issued its decision here—the Eighth Circuit's decision in *Watson*—the government effectively conceded the issue "because it did not wish to urge a circuit split." *Watson*, 493 F.3d at 963. According to the Eighth Circuit's opinion, the government stated at oral argument that "it had recently become aware that its position ran counter to that of at least two other circuits, which held that the failure of counsel to file a requested appeal amounted to ineffective assistance even if a petitioner had waived his appeal rights in a plea agreement." *Ibid.* (citing decisions from the Second and Tenth Circuits). The *Watson* court's decision also notes that after the oral argument in the case, both the Fourth and Fifth Circuits also joined the Second and Tenth in concluding that *Flores-Ortega* applies even in the case of an appeal waiver. *Id.* at 964 (citing *Poindexter* and *Tapp*, *supra*). The Eighth Circuit went on to adopt the same conclusion, explaining that "[t]his view is most consistent with the Supreme Court's holding in *Flores-Ortega* that a defendant is prejudiced by the forfeiture of an appeal regardless of its apparent merit." *Ibid.*; see also *Poindexter*, 492 F.3d at 272 (it would undermine *Anders* and *Flores-Ortega* to hold "that, by agreeing to waive his right to appeal his sentence,

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new appeal outright, the Court of Appeals remanded for an evidentiary hearing on whether the petitioner told counsel to file an appeal. The same would likely be necessary here.

Poindexter was agreeing to waive the right to the effective assistance of counsel in pursuing an appeal").

The fact that the Seventh Circuit denied creating a conflict among the circuits is of no moment. The Seventh Circuit acknowledged and expressly criticized the positions taken by the other circuits discussed above. App. 3a-4a. And it held—in direct conflict with these other decisions—that "[b]ecause the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal" *Id.* at 3a.

True, the Seventh Circuit purported to find it unnecessary to directly weigh in on the dispute through an alternate holding at the end of its decision. App. 7a-8a. But this alternative holding is entirely circular and does not eliminate the conflict. The court reasoned that it need not decide whether counsel's failure to file a notice of appeal would entitle Nunez to a new appeal, because Nunez's plea agreement also contained a collateral review waiver that barred relief on collateral review. *Ibid.* But that reasoning ignores the fact that if the plea itself were involuntary in its entirety—an issue that Nunez would have raised on direct appeal—the collateral review waiver would have been invalid as well.

In any case, even if this circular proposition were rhetorically sound, it merely adds to—and does not eliminate—the conflict among the circuits. Collateral review waivers were also present in the cases before the Second, Fifth, Tenth and Eleventh circuits. None of those circuits found such a waiver to be a bar to an award of relief on collateral review—relief in the form of a new direct appeal under *Flores-Ortega*. See *Campusano*, 442 F.3d at 772 n.1 (case involved waiver of right to both appellate review and collateral

review of any sentence within the stipulated guidelines range); *Gomez-Diaz*, 433 F.3d at 790 (case involved waiver of right to both appeal and collateral review without any explicit reference to ineffective assistance as an exception); *Garrett*, 402 F.3d at 1266 n.5; *Tapp*, 491 F.3d at 264, 265-66 (case involved waiver of right to appeal or collateral attack on any basis besides upward departure or above maximum sentence; noting that collateral review waivers were also present in *Campusano*, *Gomez-Diaz*, and *Garrett* and expressly refusing to reach a different result based on the presence of such a waiver). There can be no doubt, therefore, that if this case had arisen in any of these four circuits, petitioner's waiver would *not* have been treated as foreclosing his ineffective assistance claim and barring the relief that would otherwise be available under *Flores-Ortega*.

Finally, the Seventh Circuit's minority view has already had concrete repercussions and places courts within that circuit squarely at odds with courts elsewhere. District courts in the Seventh Circuit have already begun to apply the *Nunez* decision, denying a new appeal to criminal defendants whose attorneys allegedly refused to honor their clients' decision to file a notice of appeal, based on the presence of a plea agreement with an appeal waiver. See *Salas* v. *United States*, No. IP 05-111-H/F-CR-01, 2007 WL 3286611, at *3 (S.D. Ind. Nov. 6, 2007); *Herrmann* v. *United States*, No. 05-3277, 2007 WL 2700161 (C.D. Ill. Sept. 10, 2007).

Indeed, in the *Herrmann* case, the court relied on *Nunez* to vacate an earlier order in which the court had relied on the unanimous precedent in other circuits to conclude that it should hold an evidentiary hearing to further explore the claim that counsel failed to file a requested appeal. *Ibid.* That case pro-

vides a rather dramatic illustration of the impact of the decision in *Nunez* below, which at least one district court has understood to require a result exactly opposite of that reached under the other circuits' precedent.

Thus within the Seventh Circuit—aside from any discussion of a waiver of collateral review—the *Nunez* decision is being interpreted and applied as holding that an "attorney acts properly in honoring [a] waiver of . . . appeal rights in the Plea Agreement," *Id.* at *1. This trend can only be expected to increase now that attorneys in the Seventh Circuit are on notice that there is no need to honor a client's wish to file a notice of appeal so long as an appeal waiver applies. This Court's intervention is necessary to resolve this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LINDA T. COBERLY
Counsel of Record
BROOK R. LONG
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

DECEMBER 2007

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-1014
ARMANDO NUNEZ,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 3385—Harry D. Leinenweber, *Judge.*

SUBMITTED JULY 19, 2006—DECIDED JULY 31, 2007

Before EASTERBROOK, *Chief Judge*, and BAUER AND COFFEY, *Circuit Judges.*

EASTERBROOK, *Chief Judge.*

Charged with multiple cocaine offenses, Armando Nunez negotiated a plea bargain: the prosecutor dismissed all counts but one and recommended a sentence at the lowest point in the Guideline range. As part of the deal, Nunez agreed not to appeal or file a collateral attack unless the sentence exceeded the statutory maximum or the waiver clause itself should be deemed invalid. The sentence of 160 months' imprisonment followed the prosecutor's recommendation and is well under the statutory maximum. *See*

21 U.S.C. §841(b). Nunez has never argued that the waiver is invalid. Nonetheless, he told his lawyer to appeal (or so he says; the assertion has been contested, but we shall assume that Nunez did ask). When the lawyer balked, he filed this collateral attack under 28 U.S.C. §2255 charging counsel with providing ineffective assistance.

Although Nunez never asked the district court for leave to withdraw the plea—and in open court assured the judge that the deal was satisfactory and his assent voluntary—he now maintains that the guilty plea was involuntary because he could not understand what his lawyer told him out of court. If the plea was involuntary, then the waiver falls because it is part of the whole package. *See United States v. Wenger*, 58 F.3d 280 (7th Cir. 1995). But the lack of a motion to withdraw the plea means that Nunez must overcome that forfeiture by showing cause and prejudice. (On direct appeal the standard would have been plain error, *see United States v. Vonn*, 535 U.S. 55 (2002), but on collateral attack the forfeiture is complete and the petitioner must meet the higher standard of cause and prejudice. *See United States v. Frady*, 456 U.S. 152 (1982).) Nunez would lose on *any* standard, however, as the district judge concluded.

Nunez contends that he speaks no English, and that, because during some consultations with his counsel an interpreter was not present (or was not used), he could not understand what counsel told him and therefore did not comprehend the plea bargain's terms. That assertion is inconsistent with assurances given to the judge, under oath, when entering the plea. Nunez told the judge— through an interpreter—that he fully understood the plea and the

bargain's terms. The judge asked him detailed questions; his answers evinced knowledge. His counsel explained to the court how the plea had been negotiated and that Nunez often spoke in English and understood their exchanges when interpreters were not present (or were not employed). Nunez told the judge that this was correct.

Defendants cannot obtain relief by the expedient of contradicting statements freely made under oath, unless there is a compelling reason for the disparity. *See, e.g., United States v. Peterson*, 414 F.3d 825, 826–27 (7th Cir. 2005); *United States v. Stewart*, 198 F.3d 984 (7th Cir. 1999); *United States v. Messino*, 55 F.3d 1241, 1248 (7th Cir. 1995); *United States v. Ellison*, 835 F.2d 687, 692–93 (7th Cir. 1987). Nunez offers no reason at all; his appellate briefs simply ignore what he told the judge in open court. What is more, if, as the record demonstrates, Nunez fully understood the bargain's terms by the time he stood before the judge, it doesn't make any difference whether he understood all of what his lawyer had said earlier. The plea was voluntary.

Because the plea was voluntary, the waiver must be enforced. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal. The waiver has only two exceptions: an illegally high sentence, and a defect in the waiver itself. A claim of post-sentencing ineffective assistance falls squarely within the waiver.

In saying this, we recognize that six courts of appeals have held that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on his client's request. *See United States v. Campusano*,

442 F.3d 770, 772–77 (2d Cir. 2006); *United States v. Poindexter*, 2007 U.S. App. LEXIS 15360 (4th Cir. June 28, 2007); *United States v. Tapp*, 2007 U.S. App. LEXIS 15343 (5th Cir. June 28, 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195–99 (9th Cir. 2004); *United States v. Garrett*, 402 F.3d 1262, 1265–67 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 791–94 (11th Cir. 2005). These decisions all rely on the holding of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), that a criminal defendant has a statutory right to appellate review, and that when counsel utterly frustrates that right by failing to appeal on his client's request, counsel's performance is automatically ineffective. A lawyer who does not show up for trial might as well be a moose, and giving the defendant a moose does not satisfy the sixth amendment. *See United States v. Cronic*, 466 U.S. 648 (1984). The same understanding applies when the lawyer does not show up for appeal.

There is much to be said for this position, because waivers of appeal are not airtight. As we have already observed, a waiver stands or falls with the plea bargain of which it is a part. A defendant who wants a lawyer to argue on appeal that the plea was involuntary has a right to that legal assistance. Moreover, waivers of appeal have different scope. Some—for example, the waiver in *Poindexter*—concern only the sentence; an appeal that calls the conviction itself into question is not foreclosed by such a waiver. Had the district judge imposed a sentence higher than the statutory maximum, Nunez too could have appealed.

A rule that a lawyer must file an appeal on demand, and let the court of appeals sort out whether the defendant is entitled to appellate review, avoids

any need to make nice distinctions during the 10 days allowed for appeal (or on collateral review if the lawyer fails to file the notice). Simplicity is a virtue, and a mechanical rule ("On request, file a notice of appeal") could be a good addition to the Federal Rules of Criminal Procedure whether or not the Constitution demands this outcome.

We confess to some doubt about the constitutional reasoning of the circuits that have located in the sixth amendment a rule that a lawyer is the client's puppet. In *Roe* the Court remarked that a failure to file a notice of appeal "cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." 528 U.S. at 477. Usually that's true, for an appeal can help but not harm the defendant. But filing cannot be called "ministerial" when the defendant has waived any entitlement to appeal, not only in the plea agreement but also in open court. *See* Fed. R. Crim. P. 11(b)(1)(N). There is no constitutional entitlement to revoke a waiver; to the contrary, waivers must be enforced even if the defendant changes his mind. A defendant who waits past the time for appeal (10 days in federal court) to ask his lawyer to proceed cannot expect that this will be done as a "purely ministerial" task, for after 10 days there is no longer a right to appeal; likewise there is no longer a right to appeal following a waiver.

Far from having a ministerial duty to follow his client's (latest) wishes, a lawyer has a duty to the judiciary to avoid frivolous litigation—and an appeal in the teeth of a valid waiver is frivolous. A lawyer also has a duty to his client to avoid taking steps that will

cost the client the benefit of the plea bargain. (That's another reason why filing a notice of appeal, if the client has surrendered that right in exchange for something he values more, such as a shorter sentence, can't be called a "ministerial duty.") A lawyer might have a responsibility to file an appeal if the client indicated a desire to withdraw the plea, for that amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too; but Nunez (who had not moved to withdraw the plea) does not contend that he told his lawyer that he had any desire to achieve that goal by an appeal.

Ordinarily a lawyer cannot make an independent decision about whether an appeal would be frivolous but must follow the procedure outlined in *Anders v. California*, 386 U.S. 738 (1967), and proceed as an advocate until the judiciary agrees with counsel's belief that more litigation would be frivolous. As we explained in *United States v. Eskridge*, 445 F.3d 930, 932 (7th Cir. 2006), however, the *Anders* procedure is required only when there is a right to appeal (and thus a right to have counsel act as an advocate *on* appeal). Nunez gave up his right to appeal, and with it the foundation for the *Anders* approach.

With the waiver in force, counsel's duty to protect his client's interests militates against filing an appeal. *United States v. Whitlow*, 287 F.3d 638 (7th Cir. 2002), and *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001), hold that, when a defendant violates a plea agreement by appealing despite a promise not to do so, the prosecutor may withdraw concessions made as part of the bargain. The prosecutor made substantial concessions to Nunez. An appeal could have put

them in jeopardy, allowing the prosecutor to reinstate the two dismissed charges or ask the district court to increase the sentence on the existing conviction. If it did nothing else, an appeal would have demonstrated that Nunez had *not* accepted responsibility and would have entitled the judge to rescind the discount under U.S.S.G. §3E1.1. A defendant has more reason to protest if a lawyer files an appeal that jeopardizes the benefit of the bargain than to protest if the lawyer does nothing—for "nothing" is at least harmless.

The sort of appeal that the Supreme Court considered in *Roe* is one where the defendant can gain but not lose. The sort of appeal that Nunez wanted to take was one by which he could lose but not gain. Protecting a client from a lay-person's folly is an important part of a lawyer's job. It will not do to reply, along the lines of *Roe*, that whether to appeal is a decision entrusted to the defendant personally, on which the lawyer may give advice but not act unilaterally. Nunez *had* made a personal decision—a decision not to appeal. That's what the waiver was all about. As we've stressed, a defendant has no right to countermand such a formal choice, and a lawyer faced with inconsistent instructions by his client does not have a "ministerial" duty to follow one rather than the other. The lawyer's duty is to do what's best for the client, which usually means preserving the benefit of the plea bargain.

But we need not decide whether these arguments are a sufficient response to the mandatory-appeal-notwithstanding-the-waiver-of-appeal approach that our colleagues in other circuits have derived from *Roe*. For there remains the question whether Nunez is entitled to relief based on a conclusion that his

lawyer furnished ineffective assistance after the district judge pronounced sentence. Recall that the waiver Nunez negotiated forswears not only a direct appeal but also any opportunity to wage a collateral attack. Ineffective assistance before the plea's acceptance might spoil the plea's validity and thus undermine the waiver. But ineffective assistance *after* the plea (indeed, after the sentence's imposition) cannot retroactively make the plea invalid. Waivers of appeal block constitutional as well as statutory arguments. *See United States v. Behrman*, 235 F.3d 1049 (7th Cir. 2000).

If the plea (and thus the waiver) is valid, an argument that counsel furnished ineffective assistance is among the foreclosed theories. *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir. 1999), holds that a claim of ineffective assistance may be open under §2255, but that "the right to mount a collateral attack . . . survives only with respect to those discrete claims which relate directly to the negotiation of the waiver." *See also United States v. Joiner*, 183 F.3d 635, 644–45 (7th Cir. 1999). Nunez's challenge to his lawyer's handling of the appeal has nothing to do with the negotiation of the waiver. Thus Nunez's waiver must be enforced and his collateral attack dismissed whether or not his lawyer should have filed an appeal on demand.

AFFIRMED

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT- WITHOUT ORAL ARGUMENT

Date: July 31, 2007

BEFORE:

Honorable FRANK H. EASTERBROOK, Chief Judge

Honorable WILLIAM J. BAUER, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

No. 06-1014

ARMANDO NUNEZ,
Petitioner - Appellant
v.
UNITED STATES OF AMERICA,
Respondent - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 04 C 3385, Harry D. Leinenweber, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

APPENDIX B

In the United States District Court
for the Northern District of Illinois
Eastern Division

Filed Oct. 18, 2005

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARMANDO NUNEZ,

Defendant.

Case No. 04 C 3385

Hon. Harry D. Leinenweber

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Armando Nunez's (hereinafter, "Defendant") Petition for Writ of Habeas Corpus under 18 U.S.C. § 2255 and his Motion to Supplement.

I. BACKGROUND

Defendant entered into a Guilty-Plea Agreement (hereinafter, the "Agreement") before this Court on December 19, 2002. He was indicted and charged with three counts involving conspiracy and distribution of cocaine. (P.A. at 2). Defendant's counsel, John

M. Cutrone, Esq., negotiated a Plea Agreement on Defendant's behalf and advised him to accept the agreement in light of the substantial evidence compiled against Defendant. Pursuant to the Agreement, the government recommended the dismissal of Counts I and III and that the Court impose a reduced sentence on Count II. In exchange, Defendant pled guilty to Count II, involving a violation of 21 U.S.C. § 846: "conspiring to knowingly and intentionally possess with intent to distribute and to distribute a controlled substance, from October 2001 to September 2002, namely, in excess of five kilograms of mixtures containing cocaine...." *Id.*

The Agreement states that during the aforementioned time period, Defendant and several co-conspirators agreed to transport drugs concealed in automobiles from the Chicagoland area to distribution locations throughout Illinois, Indiana, and New Jersey. (*Id.* at 3, 5). The Agreement also states that Defendant drove to New Jersey an average of twice a month over an approximate four-month period to distribute drugs concealed in his vehicle. (*Id.* at 5). On July 11, 2002, Defendant distributed a cocaine mixture to undercover law enforcement. (*Id.* at 6). The Court sentenced Defendant to 135 months in prison and 60 months of supervised release pursuant to his plea agreement. (06/10/03 Tr. at 11).

II. LEGAL STANDARD

For relief under 28 U.S.C. § 2255, a prisoner must demonstrate a "fundamental defect which inherently results in a complete miscarriage of justice" violating the Constitution or laws of the United States. *United States v. Addonizio,* 442 U.S. 178, 185,

99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979). A § 2255 motion does not substitute for a direct appeal. Without raising the habeas issue on appeal, a petitioner must demonstrate good cause for and actual prejudice from the failure to raise the issue. *Theodorou v. United States,* 887 F.2d 1336, 1339 (7th Cir. 1989); *see also Williams v. United States,* 805 F.2d 1301, 1305-06 (7th Cir. 1986), *cert. denied,* 481 U.S. 1039, 107 S. Ct. 1978, 95 L. Ed. 2d 818 (1987) (applying this standard to guilty pleas).

III. DISCUSSION

Defendant's petition requests relief on four grounds: (1) ineffective assistance of counsel; (2) the district court's lack of jurisdiction over the case; (3) failure of the district court to construe strictly 18 U.S.C. § 3013; and (4) failure of the district court to construe narrowly United States Sentencing Guidelines Section 2D1.1. Defendant's plea agreement states that "defendant knowingly waives the right to appeal any sentence ... defendant also waives his right to challenge his sentence ... in any collateral attack ... including but not limited to a motion brought under [§ 2255]." (P.A. at 11). So that with respect to grounds two through four, Defendant is foreclosed from bringing these claims in his post-conviction petition.

Further, even if Defendant's claims attacking the jurisdictional legality of his plea agreement and his sentence were not foreclosed, Defendant misunderstands the law and his arguments on grounds two through four are without merit. The United States had proper jurisdiction in this case because of the interstate nature of the drug-crime violations and the

factual connection to Chicago, where this Court sits. Also, Defendant's confusing arguments in his memorandum concerning his sentence and "taxing" under 28 U.S.C. § 3013 are not cognizable claims.

Defendant did not file an appeal in this case on any of the available issues, which include involuntariness or ineffective assistance of counsel. (*See id.*) On March 7, 2005, Defendant filed a motion to supplement his § 2255 petition to include an ineffectiveness of counsel claim regarding his counsels' failure to file an appeal to challenge Defendant's waiver of appellate rights. This amendment is moot because the plea agreement allows Defendant to challenge the voluntariness of his agreement either on appeal or on post-conviction review. (*See id.*) The Court will incorporate his voluntariness arguments into the pending § 2255 petition, which arguments also subsume his ineffective assistance allegations. The Court now considers, on collateral review, Defendant's claims involving the voluntariness of his agreement.

Defendant argues that the Court should revoke his agreement because he does not speak English and he therefore understood "nothing" in his agreement. Defendant's plea agreement is void if the Court finds that it was *not* knowing and voluntary, which due process requires. *See United States v. Gilliam,* 255 F.3d 428, 433 (7th Cir. 2001); *United States v. Lockwood,* 416 F.3d 604, 608 (7th Cir. 2005). Defendant's testimony and the attendant circumstances at his change of plea hearing demonstrate that his plea was knowing and voluntary. (*See* 12/19/02 Tr. at 2). His alleged lack of understanding of English was not an issue at the hearing because a Spanish interpreter was present to assist him. (*Id.* at 2-3). The record also

indicates that Defendant understood certain questions independent of his interpreter and was able to answer those questions sufficiently in English. (*See id.*)

Furthermore, Defendant did not object to or question the provisions of his plea agreement during the hearing. He had the opportunity to do so throughout the hearing either on his own accord or in response to the Court's specially tailored questions, which were designed to elicit Defendant's understanding and voluntariness of his plea. (*See id.*); Fed. R.Crim. Proc. 11. Instead, Defendant admitted responsibility for the factual basis of Count II and indicated that he understood the rights he was giving up by pleading guilty, which included the right to appeal the validity of his plea and his sentence. (12/19/02 Tr. at 18-22).

The Court specifically asked Defendant if (1) the plea agreement was read to him before he signed it; (2) he was convinced he understood all the provisions of the agreement; (3) he was satisfied with having gone over the agreement with Counsel in English; and (4) it also was read to him in Spanish. (*Id.* at 23). Defendant responded with an affirmative "[y]es" to all of these questions except the fourth inquiry. *Id.* When Defendant's counsel, Cutrone, assured the Court that Defendant could communicate in English and understood all the terms of the agreement despite only having reviewed it with counsel in English, Defendant did not disagree. (*Id.*)

Moreover, Defendant did not object to the plea agreement at his subsequent sentencing hearing where he was represented by another attorney, Robert L. Rascia, Esq. (*See generally* 06/10/03 Tr.) He

had a full and fair opportunity to do so during sentencing with the assistance of another Spanish interpreter. (*See id.* at 18-21).

In his petition, Defendant does not provide any evidence or other explanation of why he did not protest against terms of the plea agreement during his change of plea hearing or sentencing hearing. (*See* Pet.; 12/19/02 Tr.; 06/10/03 Tr.) Nor does he explain why the argument in his petition--that he understood "nothing" in English--contradicts his testimony at both hearings. (*See* Pet.; 12/19/02 Tr.)

An affidavit submitted by Cutrone, Defendant's plea hearing counsel, strengthens the argument that Defendant made his plea knowingly and voluntarily. (*See* Cutrone Aff.) Cutrone had multiple conversations in English with Defendant about the provisions of the plea agreement before Defendant's plea hearing. Cutrone's affidavit states that Defendant demonstrated proficiency in understanding and speaking English and never voiced any hesitation over the terms of his agreement, even after Cutrone constantly asked him if he understood. (*Id.* at ¶ ¶ 11-12, 19). Furthermore, during Defendant's change-of-plea hearing, Cutrone, who is an officer of the court, asserted that he and Defendant "communicated mostly in English without a problem." (12/19/02 Tr. at 6).

Moreover, Defendant's multiple signed § 2255 *pro se* filings consist of relatively complex words and ideas in cogent English. Although not a determinative factor in the outcome of his petition, this fact further supports the clearly established record that Defendant's plea was knowing and voluntary.

Accordingly, Defendant's plea agreement comports with the requirements of due process. His claim of prejudice by ineffective assistance of counsel, which he bases on his counsels' failure to file an appeal, is therefore moot. (Supp. Pet. at 1-3; Pet. Reply at 3). Defendant cannot appeal his sentence because he waived his appellate rights as part of his plea. (P.A. at 11).

IV. CONCLUSION

For the reasons stated herein, Defendant's Petition for Writ of Habeas Corpus incorporating his Motion to Supplement is DENIED.

IT IS SO ORDERED.

/s/
Harry D. Leinenweber, Judge
United States District Court

Dated: October 18, 2005.

United States District Court
Northern District of Illinois
Eastern Division

United States of America

v.

Armando Nunez

JUDGMENT IN A CIVIL CASE

Case Number: 04 C 3385

□ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Petition for Writ of Habeas Corpus under 18 U.S.C. § 2255 and his Motion to Supplement is denied.

Michael W. Dobbins, Clerk of Court

Date: 10/18/2005 /s/ Wanda Parker, Deputy Clerk

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 19, 2007

Before

Hon. FRANK H. EASTERBROOK, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

ARMANDO NUNEZ,
Petitioner – Appellant,

No. 06-1014 v.

UNITED STATES OF AMERICA,
Respondent – Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 04 C 3385
Harry D. Leinenweber, *Judge.*

Order

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on August 31, 2007. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.